APPEAL NO. 040576
FILED APRIL 22, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 30, 2004. The hearing officer decided that the appellant (claimant herein) was intoxicated at the time his injury occurred relieving the respondent (carrier herein) from liability for the injury, and that consequently, the claimant did not have disability. The claimant appeals, contending that there are errors in the hearing officer's decision that need to be corrected and that the blood test upon which the hearing officer based his determination of intoxication was not accurate in light of the other evidence. The carrier responds that the evidence supports the decision of the hearing officer.

DECISION

We reform the decision of the hearing officer by correcting typographical errors. Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer as reformed.

We first address the issue of typographical errors in the decision of the hearing officer. The claimant argues that in his Conclusion of Law No. 2 the hearing officer determined that the claimant was intoxicated from the involuntary introduction of a controlled substance into his body. The claimant points out that this case dealt with the issue of alcohol intoxication, and not with an issue of intoxication from a controlled substance. We recognize that this is clearly the case and reform the hearing officer's decision to read "alcohol" where it reads "controlled substance." The claimant also points out that the hearing officer's decision reflects that Carrier's Exhibit No. 8 was admitted when the record reflects it was excluded because it was not timely exchanged. There is also a clear notation on the carrier's exhibit list that Carrier's Exhibit No. 8 was excluded and the hearing officer makes no reference to this exhibit either in his discussion of the evidence or in his findings. We find that the listing of Carrier's Exhibit No. 8 as an exhibit that was admitted is a typographical error and reform the hearing officer's decision to reflect that this exhibit was proffered but was not admitted.

It is undisputed that the claimant was injured in a one-vehicle rollover accident on _____, while working as a truck driver. This accident took place at approximately 1:00 p.m. It is also undisputed that the claimant was taken from the scene of the accident to an emergency room where a blood test taken at 1:45 p.m. indicated a blood alcohol level of .2978 and where a second blood test taken at 6:31 p.m. showed a blood alcohol level of .1951. The claimant argues that these admittedly very high blood alcohol levels were inconsistent with the descriptions of the claimant's physical condition both at the scene of the accident and at the emergency room. The claimant presented a medical report from Dr. B, who states that he reviewed both the

records of the emergency medical service and emergency room personnel and concluded as follows:

> The emergency room and EMS records depict a patient totally different from a patient who has a 0.3% blood alcohol concentration, as indicated by the laboratory testing. It is my opinion that, within reasonable medical probability, [the claimant's] blood alcohol concentration could not have been 297.8 mg./dl. as indicated by the laboratory report.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the claimant was in a state of intoxication. Section 401.013(a) defines intoxication as:

> (1) having an alcohol concentration to qualify as intoxicated under Section 49.01(2), Penal Code; or
>
> (2) not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of:
>
> (A) an alcoholic beverage. . . .

The Penal Code section cited, effective September 1, 1999, lists the referenced concentration as 0.08, the ratio of alcohol to specified amounts of blood and urine cited in the first provision of that statute.

The question of whether the claimant had an alcohol concentration of 0.08 at the time his injury occurred was a question of fact for the hearing officer. There was conflicting evidence concerning the accuracy of the blood alcohol testing. The hearing officer was persuaded that the claimant met the definition of alcohol intoxication in this case and nothing in our review of the record reveals that the hearing officer's determination in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Thus, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The success of the claimant's challenge to the hearing officer's disability determination is dependent upon the success of his argument that he did have a compensable injury because he was not in a state of intoxication at the time of the injury. Given our affirmance to the determination that the claimant was intoxicated at the time of the injury, we likewise affirm the determination that the claimant did not have disability. Since the claimant was intoxicated, the carrier is not liable for compensation. With no compensable injury found, there is no loss upon which to find disability. By definition disability depends upon a compensable injury. *See* Section 401.011(16).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

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Edward Vilano
Appeals Judge